UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1999/7/Add.1
31 May 1999

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Fifty-first session
Item 3 of the provisional agenda

COMPREHENSIVE EXAMINATION OF THEMATIC ISSUES RELATING TO THE ELIMINATION OF RACIAL DISCRIMINATION

The Rights of Non-Citizens

Working paper submitted by Mr. David Weissbrodt in accordance with Sub-Commission decision 1998/103

Addendum

Issues relating to migrants

1. In its decision 1998/103 the Sub-Commission requested Mr. David Weissbrodt to prepare a working paper on the rights of persons who are not citizens of the country in which they live. In the decision the Sub-Commission mentioned several issues that might be considered in the working paper for further study, including ways of overcoming impediments to ratification of the International Convention on the Rights of All Migrant Workers and Members of Their Families and ways of contributing to the efforts of the working group of intergovernmental experts on the human rights of migrants of the Commission on Human Rights. The present documents respond to those two issues relating to migrants.

GE.99-13569 (E)

I. INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

A. Context of the ratification of the Migrant Workers Convention

2. As noted in the main report (paras. 47-49) the pace of ratification of the Convention has been slow. In assessing the speed of ratification of the Convention, however, it is useful to consider the time that was required for the ratification of other human rights conventions. The Migrant Workers Convention was adopted by the General Assembly over eight years ago, and still has not entered into force. Although this is of concern, it is important to note that other conventions have taken varying amounts of time to enter into force.

3. Some conventions received enough ratifications to enter into force very quickly, while other conventions have taken a number of years to enter into force. On the one hand, the Convention on the Rights of the Child was adopted by the General Assembly on 20 November 1989 and entered into force on 2 September 1990 - less than one year later. On the other hand, two of the major conventions which comprise the International Bill of Human Rights each took nearly 10 years to enter into force. The International Covenant on Economic, Social and Cultural Rights was adopted on 16 December 1966 and did not enter into force until 3 January 1976. The International Covenant on Civil and Political Rights was also adopted on 16 December 1966, and entered into force on 23 March 1976. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment took two and a half years (1984-1987) and the International Convention on the Elimination of All Forms of Racial Discrimination took nearly three years (1966-1969).

B. Impediments to ratification of the Migrant Workers Convention

4. In order to identify obstacles to ratification and to seek ways of overcoming them, two meetings of high-level governmental experts for the African region and the Asian-Pacific region were held in Addis Ababa from 14 to 17 May 1996 and in Amman from 1 to 4 September 1997, respectively. In addition, Shirley Hune and Jan Niessen have comprehensively examined current difficulties and prospects for ratifying the Migrant Workers Convention. 1/

1. Jurisdictional conflict between the United Nations and the International Labour Organization

5. "The ILO was to be concerned with migrants as workers and the United Nations was to be concerned with their status as aliens. It would appear, however, that this agreement between the United Nations and the ILO has lost much, if not all, of its validity as a result of the adoption of the [Migrant Workers Convention]." 2/ Some nations have stated that a new convention on the rights of migrant workers was not needed due to the already existing ILO provisions. 3/ They specifically cite ILO Convention Nos. 97 and 143 as two existing multilateral treaties on the rights of migrant workers, 4/ and conclude that ratification of the new Migrant Workers Convention is not needed. 5/

2. Benefits and drawbacks of ILO

6. The ILO conventions are considered superior to the Migrant Workers Convention by some because "the unique tripartite contribution by Governments, employers, and workers to the content of ILO standards makes them a worthy foundation on which to build further safeguards for migrant workers and their families". 6/ The ILO only has, however, "limited competence to deal with such concerns as culture, education, and political participation". 7/ In addition, the Secretary-General has stated that "the standards applicable to migrants under ILO instruments represent only the minimum required for their protection". 8/

(a) Benefits of the United Nations Convention

7. The United Nations Migrant Workers Convention extends rights to a number of groups previously not covered by the ILO conventions, namely "frontier, itinerant, project-tied, specified employment and self-employed migrant workers". 9/ In addition, the Migrant Workers Convention is considered to be "the most ambitious statement to date of international concern for the problematic condition of undocumented migrants". 10/

(b) Possible duplication

8. Some analysts believe that there is duplication between ILO standards and the Migrant Workers Convention because "no two different drafting processes in international forums will ever produce identical results". 11/ Some analysts, however, conclude that this is only a problem "where the new text falls below existing standards. ... The development of human rights requires that later instruments be more favorable to individuals than earlier ones". 12/ Because the Migrant Workers Convention provides for greater rights

than existing ILO standards, it cannot be said that the Migrant Workers Convention duplicates ILO standards, although some States may not wish to extend further rights to migrants.

(c) Role of the Migrant Workers Convention in regard to undocumented migrants

9. "The prevailing view [in conventional international law] is that States may draw limits, and that they may condition the entry of foreigners into their territory upon their consent." 13/ "Opponents [of rights for the undocumented] assert ... that States should not be obliged to provide undocumented aliens anything more than minimal human rights protections because they are not party to the social contract which binds the national community." 14/

10. Because "[m]igrant workers face the gravest risks to their human rights and fundamental freedoms when they are recruited, transported and employed in defiance of the law", 15/ the prevention of illegal migration will reduce human rights abuses. Therefore, one purpose of the adoption of the Migrant Workers Convention is to discourage illegal migration. 16/ Article 68 of the Migrant Workers Convention requires States parties to "collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation". "More specifically, States parties are required to take appropriate measures ... to detect and eradicate illegal or clandestine movements; and measures to impose effective sanctions on persons, groups or entities which organize, operate or assist illegal or clandestine migration." 17/ Therefore, the Convention will ultimately serve to reduce the number of irregular migrants residing within States parties, also reducing associated costs to Governments.

11. In addition, the Convention places no restrictions on the qualifications States parties utilize to determine the admissibility of migrants. Article 79 specifically states that "[N]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families."

(d) Economic issues

12. According to Hune and Niessen, the major impediment to ratification of the Migrant Workers Convention is international economic, social, and political instability. Specifically, they cite low economic growth, economic restructuring of basic industries, shrinking wages, and rates of

unemployment. 18/ Due to the arrival of migrants in concentrated groups, both chronologically and spatially, as well as cultural and language differences, "Governments are less able to absorb a sizeable increase in newcomers and at the same time maintain the same level of social securities for their populace". 19/

13. It is specifically because of these perceived economic conditions, and the tendency of Governments to view migrants as an economic burden, that the rights enumerated in the Migrant Workers Convention are necessary to ensure the human rights and fundamental freedoms of migrants.

14. Further, these economic fears are unfounded. Rather than creating an economic burden, "international labour migration should be economically beneficial to both receiving and sending countries because scarce resources [such as labour] are reallocated to a more efficient or higher wage use". 20/ Scholars have observed that receiving countries specifically benefit from foreign migrant labour through labour which may be less expensive, abundantly available, effective, generally youthful, often highly skilled and willing to take on unpleasant tasks. 21/

(e) Political climate

15. According to Hune and Niessen, the political climate is currently not hospitable towards migrant workers generally. 22/ Specific political events leading to this policy orientation are: the end of the Cold War and the subsequent instability in Central and Eastern Europe, the war in the former Yugoslavia, fear of a massive East-West flow of migrants, and the focus on security and stability within and between States which migrants are apparently seen as undermining. 23/

16. The Migrant Workers Convention specifically provides for the observance of the human rights and fundamental freedoms of migrant workers, regardless of transitory instabilities in world conditions. Particularly since perceptions of migrants are often based on false information (as described in section (d) above), it is of the utmost importance that migrants be protected.

(f) General impediments

17. In addition to these obstacles, a number of more general impediments to ratification have been identified. The impediments which should be easily overcome include lack of awareness of the existence of the Convention and a false perception about the character of the Convention as well as about the

effects of ratification. 24/ While lack of awareness and false perception are pervasive, concerted educational efforts should be undertaken to combat these underlying fears upon which other claims against ratification are based.

II. RELATIONSHIP OF THE WORKING PAPER WITH EFFORTS OF THE WORKING GROUP OF INTERGOVERNMENTAL EXPERTS ON THE HUMAN RIGHTS OF MIGRANTS AND THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS

18. In its resolution 1997/15 of 3 April 1997 the Commission on Human Rights established the working group of intergovernmental experts on the human rights of migrants with a mandate to: (a) gather all relevant information from Governments, non-governmental organizations and any other relevant sources on the obstacles existing to the effective and full protection of the human rights of migrants; and (b) elaborate recommendations to strengthen the promotion, protection and implementation of the human rights of migrants.

19. The working group initially distributed a questionnaire to all States in which it inquired: What steps have been taken in order to ratify the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Labour Organization (ILO) Convention concerning Migration for Employment (Revised), 1949 (No. 97), and the ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 (No. 143)?

20. The working group indicated in the report on its first and second sessions (E/CN.4/1998/76) that it expected to include the promotion of the ratification of relevant United Nations and ILO Conventions, in particular the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In the report on its third and fourth sessions (E/CN.4/1999/80) the working group noted that the Migrant Workers "Convention had not yet entered into force and efforts to promote its ratification should be intensified (para. 66)." To that end, the working group recommended the appointment by the Commission of a special rapporteur for a period of three years to advocate, promote and monitor the protection of the human rights of migrants.

21. At its fifty-fourth session the Commission on Human Rights, in its resolution 1999/44, decided to replace the working group by a Special Rapporteur on the human rights of migrants. The Special Rapporteur was requested, in carrying out his/her mandate, to give careful consideration to the various recommendations of the working group of intergovernmental experts

aimed at the promotion and protection of the human rights of migrants, and to take into consideration relevant human rights instruments of the United Nations to promote and protect the human rights of migrants.

22. The Commission has frequently admonished the Sub-Commission to avoid duplicating the work of the Commission (see, e.g., Commission on Human Rights resolution 1999/81 of 28 April 1999). Rather than duplicate the efforts of the Commission's Special Rapporteur on the human rights of migrants, the Sub-Commission should transmit the present working paper to the Special Rapporteur to assist in his/her work to promote the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and in the hope that these Sub-Commission documents will be of assistance in understanding ways of overcoming the identified impediments to ratification. It is doubtful, however, whether any subsequent study by the Sub-Commission should focus on these issues, because the present working paper has made the contribution which the Sub-Commission can realistically make, because the Special Rapporteur already has the relevant issues within the mandate, and because the very specific problems of migrants are only one aspect of the greater task of considering the rights of non-citizens.

23. The other important aspects of this topic are not covered by a special rapporteur of the Commission or other United Nations mechanism. Accordingly, in order to avoid unnecessary duplication and out of respect for the Commission's Special Rapporteur, whose mandate has greater resources and visibility than the present working paper, the working paper will focus on the other aspects of the rights of non-citizens.

Notes

1/ S. Hune and J. Niessen, "Ratifying the UN Migrant Workers Convention: Current Difficulties and Prospects", Netherlands Quarterly of Human Rights, vol. 12, No. 4 (1994), p. 12.

2/ Ryszard Cholewinski, Migrant Workers in International Human Rights Law, 1997, p. 138.

3/ United Nations Commission on Human Rights, forty-ninth session, position paper of the United States, "Measures to improve the situation and ensure the human rights and dignity of all migrant workers", 21 January 1993.

4/ ILO Convention No. 97 has been ratified by 41 States and ILO Convention No. 143 has been ratified by 18 States.

5/ Supra note 3.

6/ Cholewinski, supra note 2, p. 136.

7/ Ibid., p. 199.

8/ Ibid., p. 135, citing the report of the Secretary-General to the United Nations Commission for Social Development at its twenty-eighth session, entitled "Social integration. Pertinent regulations concerning the welfare of migrant workers and their families" (E/CN.5/1983/10).

9/ Roger Böhning, "The ILO and the New UN Convention on Migrant Workers: The Past and Future", International Migration Review, vol. 25 (1991), p. 698.

10/ Linda Bosniak, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention", ibid., pp. 737, 740.

11/ Ibid., p. 705.

12/ Ibid.

13/ Ibid., pp. 737, 743.

14/ Ibid., p. 750.

15/ The Rights of Migrant Workers, Fact Sheet No. 24, Office of the United Nations High Commissioner for Human Rights, 1996, p. 7.

16/ G. Fonteneau, "The Rights of Migrants, Refugees or Asylum Seekers under International Law", International Migration, vol. 30 (1992), pp. 57, 58.

17/ Supra note 15, p. 8.

18/ Hune and Niessen, supra note 1.

19/ Ibid.

20/ Cholewinski, supra note 2, p. 22.

21/ Ibid., p. 23.

22/ Hune and Niessen, supra note 1.

23/ Ibid.

24/ Ibid., pp. 9, 13.